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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

MELVIN TYLER

Petitioner

versus

BURL CAIN, WARDEN

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONER MELVIN TYLER

HERBERT V. LARSON, JR.
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorney for Petitioner
Melvin Tyler

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Petitioner Melvin Tyler, pursuant to Rule 15.6 of the Rules of the Supreme Court, respectfully submits the following reply to the brief in opposition filed in these proceedings by the State of Louisiana.

ARGUMENT

Since the day this Court handed down its opinion in *Cage v. Louisiana*, 498 U.S. 39 (1990), the State of Louisiana has resisted at every turn the application of the legal rules embodied in that decision. The State's persistence, and resistance, have paid off: notwithstanding the fact that hundreds of defendants were convicted at trials where improper reasonable doubt instructions were given, there are only three reported instances of a Louisiana defendant obtaining a new trial in a state post-conviction proceeding because of a *Cage* error. One of these was Tommy Cage himself. *See State ex rel. Cage v. Whitley*, 667 So.2d 519 (La.1996), *State v. Smith*, 600 So.2d 1319 (La.1992)

and *State v. Harrison*, 609 So.2d 789 (La.1992). Consistent with its previous efforts, the State once again seeks to undermine the meaning, and import, of both *Cage*, and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), by asking this Court to deny Tyler's petition for *certiorari*.

The State's arguments are unfortunate -- not merely because they again seek to deny a citizen that to which he has always been entitled -- a fair trial with a properly instructed jury -- but because the arguments also obscure the important federal issues in this case, and the divergence among the courts of appeals on these issues. The three reasons for denying the petition that have been advanced by the State, and the issues actually raised by petitioner, are addressed below.

1. The issue of whether 28 U.S.C. § 2244(b)(2)(A)'s requirement that retroactive application of new rules be made by the Supreme Court itself for successive petitions impermissibly constrains the federal judiciary was not presented to the court below.

It is not clear whether the State has misread the arguments petitioner actually made to this Court, or has deliberately ignored them. Under either alternative, however, the first reason advanced by the State for denying the petition makes little sense. Unquestionably, petitioner did not attack the constitutionality of 28 U.S.C. § 2244(b)(2)(A) in the court below. Nor does he do so in his petition to this Court.

At the time Tyler began his lengthy journey through the state and federal systems, the constitutionality of the statute was simply not at issue. And although the manner in which the lower courts have subsequently interpreted and applied § 2244(b)(2)(A) has raised potential constitutional questions, as noted by Tyler in his original petition, those constitutional questions need not be reached -- indeed, should not be reached in this proceeding. *See New Orleans Broadcasting Association, Inc. v. U.S.*, 527 U.S. 173, 184 (1999) and *Heckler v. Mathews*, 465 U.S. 728, 741-44 (1984).

In short, the State has confused the effects of the present conflicting interpretations of *Cage*, with the cause of those conflicting interpretations. As a consequence, its arguments under this heading do not warrant serious consideration.

2. The decision below does not raise the Question Presented in the petition regarding the retroactivity of Cage.

It was established in the Statement of the Case set forth in Tyler's original petition, (which the State concedes "adequately states the case and facts,") that in April, 1997, Tyler sought and received authorization from the United States Court of Appeals for the Fifth Circuit to file a successive petition for a writ of habeas corpus (28 U.S.C. § 2254) in the United States District Court for the Eastern District of Louisiana. The Court of Appeals specifically limited the successive petition to the questions of whether this Court's decision in *Cage v. Louisiana,* 498 U.S. 39 (1990) **should be applied retroactively**, and if so, whether the jury charge given at Tyler's trial was unconstitutional.

In an order dated September 10, 1998, the district court held that *Cage v. Louisiana,* 498 U.S. 39 (1990) **must be applied retroactively**, because of the *en banc* opinion of the United States Court of Appeals for the Fifth Circuit in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir., 1998)

However, the district court denied Tyler relief, even though the "reasonable doubt" portion of the jury charges given at his trial was indistinguishable from the one struck down by this Court in *Cage*. In the view of the district court, the Anti-terrorism and Effective Death Penalty Act (AEDPA), specifically 28 U.S.C. § 2254 (d)(1), changed the standard of review for state habeas petitioners, and under the "new" standard of review, a '*Cage*-type' instruction like the one given at Tyler's trial was in fact constitutional.

In his appeal Tyler contended that AEDPA did not change the standard of review for state

habeas petitioners. Even assuming that it did, however, Tyler argued that under the "new" standard of review, this Court's decisions in *Cage* and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) were still controlling, and that accordingly, the jury instructions given at his trial were unconstitutional. **Tyler further contended that these decisions should be given retroactive effect on collateral review.**

The Court of Appeals did not reach the substantive issues, but instead concluded that

> [t]he district court erred in not determining first whether Tyler's petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A). Procedurally, this case is governed by Brown v. Lensing, 171 F.3d 1031 (5th Cir.1999), which relies on In re Smith, 142 F.3d 832 (5th Cir.1998). **Under circumstances indistinguishable from this case, petitioner Brown was denied successive habeas relief because he could not show that any Supreme Court decision renders the Cage decision retroactively applicable to cases on collateral review, as AEDPA now requires.** Moreover, the Brown case specifically disapproved the district court's approach in this case. Brown, 171 F.3d at 1032 n.9.
>
> Like cases demand like treatment. Tyler's successive petition fails according to Brown and § 2244(b)(2)(A).
> (emphasis added)

In sum, Tyler clearly presented the question of the retroactivity of *Cage* to both the district court, and the Court of Appeals, and both courts addressed it.

The State now urges this Court to deny the petition on the grounds that

> . . . the only question actually presented by the opinion below is whether this Court has ever made *Cage* retroactive on collateral review. Whether *Cage* is a new rule and if so whether it fits under the second *Teague* exception of "watershed rules of criminal procedure" and rules which will "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. 288, 311 (1988)[*sic*] is simply not present in this case, and the Question Presented could only be resolved by rendering an impermissible advisory opinion."
> Respondent's Brief in Opposition, p.2

What the State does not appear to understand is that to resolve the question that it admits is presented, *i.e.* whether *Cage* is to be given retroactive effect to cases on collateral review, it is

necessary to determine whether *Cage* does in fact announce a new rule of law. *Teague v. Lane*, 489 U.S. 288, 311-313, (1989). There is simply no legal alternative. And there is nothing "advisory" about the opinion Tyler seeks -- what he seeks is an opinion that will give him a fair trial.

It is true, as the State argues, that the "constitutionality of the reasonable doubt jury instruction given at petitioner's trial was not addressed by the Fifth Circuit." But to suggest that this Court wait for "a case which presents an opportunity to further address the merits of such a claim, [as] a more appropriate vehicle to address this issue" is to advance an argument that must again be described as one part Lewis Carroll and one part Franz Kafka.[1] Unless and until this Court addresses the issue raised by Tyler in his petition, the issue of the constitutionality of jury instructions like those given at his trial will never be reached -- at least not in the First, Fifth, and Eleventh Circuits.

3. The Fifth Circuit did not address the reasoning of West v. Vaughn, and Williams v. Taylor may resolve the split.

In its Brief in Opposition, the State acknowledges the existence of a conflict among the circuits "as to the proper interpretation of the phrase 'made retroactive to cases on collateral review by the Supreme Court'" (Brief in Opposition, p.3). Amazingly, the State views this as a reason for this Court not to hear this case -- an argument that flies in the face of 200 years of judicial history, and Rule 10(a) of the Rules of this Court.

Unquestionably, Tyler's case was decided by the Court of Appeals for the Fifth Circuit before the Third Circuit decided *West v. Vaughn*, 204 F.3d 53 (2000). Consequently, the Fifth Circuit "did not address the Third Circuit's contrary opinion." It is irrational, however, to suggest that this Court wait until it has "the benefit of the Fifth Circuit's reasoning [with regard to the 'Third Circuit's

[1] See Tyler's Petition for a Writ of Certiorari, p. 10.

contrary opinion']." (State's Brief in Opposition, p.3).

First, any future panel of the Fifth Circuit that considers the question will be bound by the previous decisions of that court. *United States v. Taylor*, 933 F.2d 307, 313 (5th Cir.1991). Thus, while a panel of the Fifth Circuit might mention the decision of the Third Circuit in *West v. Vaughn*, *supra*, that panel could never follow it. Accordingly, the only way for this Court to obtain the "benefit" spoken of by the State is if the Fifth Circuit were to sit *en banc* to hear, or re-hear a case presenting the issue. Ironically, such hearings *en banc* are most warranted when "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . ." FRAP 35(b)(1)(A). Given that there is no Supreme Court decision with which such a Fifth Circuit panel decision might conflict, and the principle of *stare decisis* should prevent the creation a conflict within the Fifth Circuit itself, it could be quite some time before this Court receives the Fifth Circuit's views on the Third Circuit's decision in *West v. Vaughn*. To borrow from Lewis Carroll again: what the State wants is never justice today, but always justice tomorrow.

Second, this Court now has before it the two possible views on the issue: that of the Third and Ninth Circuits, and that of the First, Fifth, and Eleventh Circuits. Waiting for a court in one group to comment on the views of the other is neither meaningful, nor consistent with this Court's responsibilities.

Certainly, in *Talbott v. Indiana*, 226 F.3d 866, 868 (7th Cir.2000), the Court of Appeals for the Seventh Circuit does criticize the Third Circuit's decision in *West v. Vaughn*: "In *West* the third circuit confused a substantive question ('which decisions apply retroactively?') with a procedural question ('which court makes the retroactivity decision?')." However, such evidence of an ever-deepening conflict among the circuits can only mitigate in **favor** of granting Tyler's petition for

certiorari - not against it.

Finally, the State's suggestion that this Court let its decision in *Williams v. Taylor*, 529 U.S 362 (2000) "percolate amongst the lower courts" is not comprehensible. If this Court's opinion in *Williams v. Taylor* is in fact germane to the question of whether this Court should grant Tyler's petition -- and that is not at all clear -- federal law requires that it be applied now -- not after some indefinite percolation period.

CONCLUSION

The State has conceded that Tyler's petition for a writ of *certiorari* "adequately states the case and facts." The State has also acknowledged that Tyler's petition presents the question of "whether this Court has ever made *Cage* retroactive on collateral review." In addition, the State agrees that "there is a split amongst the circuits as to the proper interpretation of the phrase 'made retroactive to cases on collateral review by the Supreme Court.'" Yet despite what would be universally recognized as compelling arguments for a grant of *certiorari*, the State urges this Court do deny Tyler's petition. The State's suggestion should be ignored.

Wherefore, the foregoing reasons considered, this Court is respectfully urged to grant Melvin Tyler's petition for a writ of certiorari.

New Orleans, Louisiana, this 6th day of November, 2000.

HERBERT V. LARSON, JR.
700 Camp Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorney for Petitioner
Melvin Tyler